

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.A., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HEALTH ADMINISTRATION,  
Cleveland, OH, Employer**

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**Docket No. 15-1255  
Issued: March 14, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 15, 2015 appellant, through counsel, filed a timely appeal from a February 25, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant met his burden of proof to establish that he has more than five percent permanent impairment of his right arm, for which he received a schedule award.

## **FACTUAL HISTORY**

OWCP accepted that on August 15, 2012 appellant, then a 41-year-old police officer, sustained a rotator cuff tear of his right shoulder due to falling off a bicycle while on patrol at work. Appellant stopped work after his injury and, on October 8, 2012, he underwent an OWCP-authorized right rotator cuff repair for a full-thickness tear. He returned to limited duty on March 1, 2013 and full duty on May 8, 2013. On June 15, 2013 appellant filed a claim for a schedule award due to his accepted work injury.

In a report dated July 2, 2013, Dr. John L. Dunne, an attending osteopath, discussed appellant's medical history and reported the findings of his examination on July 2, 2013.<sup>3</sup> Using Table 15-34 on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>4</sup> he determined that appellant had loss of right shoulder motion equal to 12 percent permanent impairment of his right upper extremity.<sup>5</sup>

Dr. Dunne's July 2, 2013 report was sent for review by Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser. In a November 3, 2013 report, Dr. Slutsky indicated that the diagnosis-based impairment (DBI) rating method was the preferred rating method, with range of motion (ROM) as an adjusting factor. He stated that Dr. Dunne's use of the ROM rating method was not valid. Dr. Slutsky indicated that Dr. Dunne only documented one motion per joint movement and that this circumstance was not consistent with the criteria in section 15.7 on page 464 of the sixth edition of the A.M.A., *Guides*.<sup>6</sup> Using Table 15-5 (Shoulder Regional Grid) on page 403, he placed appellant under the diagnosis of rotator cuff injury, full-thickness tear, with a default value of five (due to residual loss, functional with normal motion). Dr. Slutsky indicated that there was no movement from this value due to grade modifiers and concluded that appellant had five percent permanent impairment of his right upper extremity.

In a February 25, 2014 report, Dr. Dunne repeated his prior opinion that it was appropriate to use the ROM method to rate appellant at 12 percent permanent impairment of his

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<sup>3</sup> Dr. Dunne noted range of right shoulder motion, determined *via* goniometer, with 130 degrees of flexion, 40 degrees of extension, 120 degrees of abduction, 40 degrees of adduction, 60 degrees of external rotation, and 45 degrees of internal rotation. He only listed single findings for each ROM.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> Dr. Dunne indicated that this impairment rating was not adjusted by grade modifiers. He stated that Table 15-5 did not account for the residual loss of function with loss of normal ROM.

<sup>6</sup> Dr. Slutsky also stated, "Additionally the active [ROM] obtained while performing therapy was almost normal in flexion and abduction. Therefore Dr. Dunne's [ROM] measurements are not valid for impairment calculations and do not reflect the claimant's maximum effort."

right upper extremity. On March 26, 2015 Dr. Slutsky again indicated that appellant had five percent permanent impairment of his right upper extremity under the “preferred” DBI rating method.

By decision dated June 6, 2014, OWCP granted appellant a schedule award for five percent permanent impairment of his right arm. The award ran for 15.6 weeks from July 2 to October 19, 2013 and was based on Dr. Slutsky’s impairment evaluation of the findings of Dr. Dunne. The date of maximum medical improvement was July 2, 2013, the date of Dr. Dunne’s examination.

Appellant requested a hearing before an OWCP hearing representative. During the hearing held on January 13, 2015, counsel argued that appellant’s right upper extremity impairment was best represented by the opinion of Dr. Dunne.

In a February 25, 2015 decision, the hearing representative affirmed the June 6, 2014 schedule award decision, noting that appellant did not meet his burden of proof to establish that he has more than five percent permanent impairment of his right upper extremity, for which he received a schedule award.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>7</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>8</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

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<sup>7</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>8</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

<sup>9</sup> 20 C.F.R. § 10.404. See also Ronald R. Kraynak, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>11</sup>

### **ANALYSIS**

The issue on appeal is whether appellant met his burden of proof to establish that he has more than five percent permanent impairment of his right arm, for which he received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>12</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>13</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>14</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the February 25, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be

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<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>11</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>13</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>14</sup> *Supra* note 12.

deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

**CONCLUSION**

The Board finds this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.<sup>15</sup>

Issued: March 14, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.